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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FISCHBACH AND MOORE, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 23, 1985

QUESTION PRESENTED FOR REVIEW

In *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 (1983), this Court established that a criminal sentence was unconstitutional under the eighth amendment when it was disproportionately harsh in relation to the gravity of the crime and disproportionate to sentences imposed on other criminals in the same jurisdiction and sentences imposed for the same crime in other jurisdictions. The question presented in this case is:

Whether a sentence, which would otherwise be unconstitutionally disproportionate as an "excessive fine" when measured by the objective criteria of *Solem v. Helm*, is rendered constitutional solely because the sentence falls within the range of statutorily permissible punishments and because similar sentences were imposed on codefendants in the same case?

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* Pursuant to Rule 28.1 of this Court, Petitioner Fischbach and Moore, Inc. states that it is a wholly owned subsidiary of Fischbach Corporation. The only other subsidiary of Fischbach Corporation (other than wholly owned subsidiaries) is Fischbach and Moore of Canada, Ltd. All of the subsidiaries of Fischbach and Moore, Inc. are wholly owned. Neither Fischbach Corporation nor Fischbach and Moore, Inc. have any affiliates.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Course and Disposition of Proceedings Below 3

REASONS FOR GRANTING THE WRIT 6

I. The Sentence Is Unconstitutionally Disproportionate To Other Sentences Under This Court's Proportionality Standards 7

II. The Factors Relied On By The Third Circuit Eviscerate This Court's Test For Proportionality 15

A. That Codefendants in the Same Case Received the Same Sentence Does Not Establish Proportionality 15

B. That the Sentence Does Not Exceed the Statutory Limits Is Irrelevant to Proportionality Review 17

C. Imposition of the Maximum Sentence Here Is Contrary to Congress' Intent in Enacting the Statutory Range of Penalties 19

PAGE

CONCLUSION 21

APPENDICES

A. Opinion of the Court of Appeals 1a

B. Judgment of the District Court 21a

C. Judgment of the Court of Appeals 23a

TABLE OF AUTHORITIES

Cases: PAGE

Coker v. Georgia, 433 U.S. 584 (1977) 17

Dorszynski v. United States, 418 U.S. 424 (1974) 17

Enmund v. Florida, 458 U.S. 782 (1982) 17

Furman v. Georgia, 408 U.S. 238 (1972) 17-18

Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873) 17

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983) 5-8, 11-12, 14-18

United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984). 18, 19

United States v. Ely, 719 F.2d 902 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1313 (1984) 16

United States v. Francesco, 725 F.2d 817 (1st Cir. 1984) 17

United States v. Pridgeon, 153 U.S. 48 (1894)..... 17

United States v. Serhant, 740 F.2d 548 (7th Cir. 1984).. 12

United States v. Tucker, 404 U.S. 443 (1972)..... 17

Ex Parte Watkins, 32 U.S. (7 Pet.) 568 (1833)..... 14

Weems v. United States, 217 U.S. 349 (1910) 7, 8, 18

Whitmore v. Maggio, 742 F.2d 230 (5th Cir. 1984)..... 18

Constitution, Statutes and Rules:

U.S. Const., amend. VIII 2, 7

15 U.S.C § 1.....1, 2, 3, 8

15 U.S.C. § 78dd-2(b)(1)(A) 11

15 U.S.C. § 78ff(c)(1)(A)..... 11

18 U.S.C § 831 11

PAGE

18 U.S.C § 961 11

18 U.S.C § 1007 11

18 U.S.C § 1512 11

18 U.S.C § 1513 11

18 U.S.C § 1860 11

18 U.S.C § 2156 11

18 U.S.C § 2318 11

18 U.S.C § 2319 11

18 U.S.C § 2389 11

18 U.S.C § 3231 ..... 1, 3

28 U.S.C § 1254(1) 1

42 U.S.C § 6928(d) 11

42 U.S.C § 6928(e) 11

Antitrust Procedures and Penalties Act, Public Law 93-528, Sec. 3, 88 Stat. 1708 (1974) 12, 19

Sup.Ct.R. 17.1(a) 6

Sup.Ct.R. 17.1(c) 6

Legislative Materials:

Hearing on S-782 and S-1088 before Senate Committee on Antitrust and Monopoly, 93rd Cong., 1st Sess, (1973) 20

H. Rep. No. 93-1463, 93rd Cong., 1st Sess., *reprinted in* 4 U.S. Cong. & Adm. News 6535 (1974) 20

Other Authorities:

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 20

PAGE

J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980* (1981) 9, 12, 14, 20

T. Cooley, *Constitutional Limitations* (W. Carrington 8th ed. 1927) 18

A. Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 Cal. L. Rev. 839 (1969) 8

42 Antitrust & Trade Reg. Rep. (BNA) 768 (April 15, 1982) 13

4 Trade Reg. Rep. (CCH) ¶¶ 45,080-45,084 13

[1970-1979 U.S. Antitrust Case Summary Transfer Binder] Trade Reg. Rep. (CCH) ¶¶ 45,070-45,079 13

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Fischbach and Moore, Inc. respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case, entered on December 10, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A) is not yet officially reported. A copy of the opinion is provided herewith in Appendix A.

JURISDICTION

The judgment of the Court of Appeals (App.C) was dated and entered on December 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction over this action pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner was sentenced pursuant to Section 1 of the Sherman Act which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

Petitioner seeks review of its sentence under the eighth amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. Const., amend. VIII

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, together with five other companies and five individuals,[1] were indicted on a single count for rigging bids on

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1 In addition to petitioner, the parties to the proceeding before the Court of Appeals were: Lord Electric Company, Inc.; Sargent Electric Co.; Joseph J. Rodgers; Paul E. Arbogast; Frederic B. Sargent; and Ralph D. Vryenhoek. The Howard P. Foley Co., E.C. Ernst, Inc., Tri-City Electric Co., Inc., and James L. Oesterle were defendants in the proceedings before the district court but not in the proceedings before the Court of Appeals.

electrical construction projects at certain steel mills of the United States Steel Corporation in western Pennsylvania. At trial, the government presented evidence that eighteen bids on electrical construction projects at the United States Steel Corporation's western Pennsylvania mills had been rigged and that petitioner had bid on fourteen of those projects. The eighteen projects had been let out for bid between 1974 and 1980, when the evidence established that the conspiracy had disbanded due to internal disagreements and poor business conditions.

Petitioner presented no evidence apart from a stipulation that its sole employee who had been implicated in the conspiracy was physically and mentally unable to testify at trial because of a tragic accident. Other defendants demonstrated that United States Steel would require bidders to submit two bids, an "initial" bid and a "best and final" bid, and would leak the "initial" bids to the bidders. Moreover, one defendant testified that an employee of United States Steel told him that he approved of the defendants' bid rigging provided they did not gouge his company. Evidence was offered that one of the corporate defendants had an average profit of 2.5% on bids which were allegedly rigged. The United States Steel employee subsequently denied ever knowing or acknowledging approval of any bid rigging on projects let by his company.

B. Course And Disposition of Proceedings Below

The indictment, charging petitioner and its codefendants with a single count of bid rigging in violation of 15 U.S.C. § 1, was returned on July 1, 1983 in the United States District Court for the Western District of Pennsylvania. That court had jurisdiction pursuant to 18 U.S.C. § 3231. Petitioner entered a plea of not guilty, as did all of its codefendants.

Shortly before trial, petitioner, along with two other corporate defendants and one individual defendant, moved to change their initial pleas to pleas of *nolo contendere*. The motions of petitioner and one other corporate defendant were denied, as was the motion of the individual defendant. The

motion of defendant E.C. Ernst Co. was granted because the company was in reorganization proceedings and no longer employed the individuals allegedly involved in the conspiracy on its behalf.

Acting pursuant to a plea agreement whereby it would plead guilty and pay million dollar fines in three pending indictments (including the instant indictment) in exchange for a promise of nonprosecution for other antitrust violations occurring before the date of the plea agreement, The Howard P. Foley Co. changed its initial plea to a plea of guilty prior to trial and was sentenced to pay a fine of one million dollars.

Trial commenced on February 6, 1984. At the close of the government's case, the district court granted the motions of acquittal made by Tri-City Electric Company and one of its officers, James Oesterle. Trial concluded on March 7, 1984 with the conviction of all remaining defendants, including petitioner.

In a written submission to the district court as well as during the sentencing hearing, petitioner argued that the maximum fine was not an appropriate penalty for petitioner and that it would be a disproportionate sentence. Without explaining the basis for its sentence, the district court sentenced petitioner to pay the maximum fine of one million dollars and imposed one-seventh of the costs of prosecution. All of the other convicted corporate defendants received the same fine. E.C. Ernst, which had been permitted to plead *nolo contendere* before trial because of its reorganization in bankruptcy, was given the maximum fine which was suspended in its entirety. Three of the four individual defendants who were convicted received fines of $50,000 and jail sentences of two years all but three months of which were suspended. The fourth individual found guilty received a two year sentence, fully suspended, and a $10,000 fine. The district court's judgment was entered on April 19, 1984. (App.B).

All of the defendants convicted at trial, including petitioner, appealed their convictions to the Third Circuit, which affirmed

the judgment of the district court in all respects in a judgment dated December 10, 1984. (App.C). Upon petitioner's motion, the mandate of the Third Circuit was stayed by order dated December 21, 1984.

The opinion below stated that petitioner's sentence did not violate the eighth amendment. It recited the objective criteria laid down by this Court in *Solem v. Helm*, 103 S.Ct. 3001 (1983). (App.A at 11a). Purporting to apply those objective criteria, the opinion noted that petitioner had committed a "grave crime" by engaging in a "per se" violation of the Sherman Act and had been "one of the ringleaders of [the] conspiracy." (App.A at 11a). To establish that the sentence imposed on petitioner was proportionate to other sentences within the jurisdiction, the Third Circuit noted that the sentences imposed on petitioner's codefendants were "a good example": each of the individual defendants received a fine and a prison sentence and each of the corporate defendants received a one million dollar fine. (App.A at 11a). In comparing the proportionality of petitioner's sentence with sentences for the same crime in other jurisdictions, the court relied upon petitioner's "extensive statistics on the infrequency of the imposition of the maximum fine" which nevertheless indicated "that defendants frequently are fined, and fined in large amounts." (App.A at 11a). Petitioner's fine was "extensive" but "its amount was the expression of Congress, not the judiciary." (App.A at 11a). The Third Circuit concluded that petitioner's fine "is not disproportionate to the gravity of the offense, the public policy considerations implicated and the Congressional determinations." (App.A at 11a-12a).

REASONS FOR GRANTING THE WRIT

Petitioner seeks review of a decision of the Court of Appeals for the Third Circuit affirming the imposition of the maximum permissible statutory fine of one million dollars on petitioner by the district court at sentencing. The sentences imposed on petitioner and its corporate codefendants are unprecedented in the annals of criminal antitrust law. Never before has the maximum million dollar fine been imposed on a criminal antitrust defendant for its participation in an antitrust conspiracy which had such a small, local impact on commerce. The district court did not explain its rationale for these sentences but it did note that the sole victim of the conspiracy charged had "invited" the conduct complained of.

The Third Circuit's opinion decided an important federal question in a way in conflict with applicable decisions of this Court. Sup.Ct.R. 17.1(c). Specifically, that opinion substantially eviscerates the opinion of this Court in *Solem v. Helm*, 103 S.Ct. 3001 (1983). In *Solem*, this Court established a three-part test for reviewing a sentence for proportionality under the eighth amendment. Although petitioner demonstrated the disproportionality of its sentence under that test, the Third Circuit nevertheless found the sentence not to violate the eighth amendment solely because the sentence was within the range of statutorily permissible punishments and because petitioner's corporate codefendants had received identical sentences.

The exception carved out by the Third Circuit swallows the rule laid down by this Court. Contrary to the opinion of the Third Circuit, but consistent with the decisions of this Court and the courts of appeals for other circuits, Sup.Ct.R. 17.1(a), (c), proportionality review is applicable only where a sentence is established within the statutory range of punishments: if a sentence exceeds the statutory limits, it is illegal and proportionality review is unnecessary to correct the problem. Similarly, the fact that the same judge gave identical sentences to

several codefendants convicted of the same crime in the same case cannot of itself be sufficient to establish that the sentences were proportionate for eighth amendment purposes.

Although the proportionality analysis established by this Court need not be conducted with regard to every sentence, the constitutional guarantee of proportionality applies to every criminal sentence. Yet, despite this Court's admonition that the eighth amendment's guarantee of proportionality should not be interpreted in such a way to render that guarantee "impotent and lifeless," *Weems v. United States*, 217 U.S. 349, 373 (1910), the Third Circuit has applied the proportionality analysis established by this Court in such a way that the constitutional guarantee of proportionality is meaningless. Review of the Third Circuit's decision is necessary so that the constitutional guarantee of proportionality will again serve as a check on the sentencing power of courts in the Third Circuit.[2]

I. The Sentence Is Unconstitutionally Disproportionate To Other Sentences Under This Court's Proportionality Standards

The eighth amendment to the Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This Court recently held that the eighth amendment requires "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 103 S.Ct. 3001, 3009 (1983). In that case, this Court established an analytical framework for reviewing a sentence for proportionality:

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2 Because the Third Circuit clearly failed to apply the standards for proportionality review set forth by this Court, petitioner respectfully suggests that this Court may want to consider summarily reversing the decision of the Third Circuit regarding petitioner's eighth amendment claim and remanding the case to the Third Circuit for further proceedings consistent with the Court's opinion in *Solem v. Helm*, 103 S.Ct. 3001 (1983).

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

103 S.Ct at 3010-11.

In the present case, the Third Circuit disregarded the proportionality standards established by this Court and applied its own very narrow proportionality test. Had the Third Circuit reviewed petitioner's sentence in the light of the objective criteria outlined in the *Solem* opinion, it would have concluded that petitioner's sentence was disproportionate.

Based on the first criterion alone, the sentence imposed on petitioner is an "excessive fine" prohibited by the eighth amendment.[3] Petitioner received the harshest possible penalty, the maximum fine of one million dollars. 15 U.S.C. § 1. Yet the "gravity of the offense" did not warrant such a penalty.

Because an antitrust violation is an economic crime, the economic impact of the conspiracy is a critical factor in assessing the gravity of a criminal antitrust violation. Indeed, even in a non-antitrust context this Court recognized that "stealing a million dollars is viewed as more serious than stealing a hundred dollars." 103 S.Ct. at 3011. A comparison of the amount of commerce affected by the conspiracy charged here with the amount of commerce affected in the average antitrust case indicates the gravity of the offense here was

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3 The proportionality concept clearly applies to the "excessive fine" prohibition of the eighth amendment. Indeed, as this Court has previously noted, the constitutional requirement has its origins in the Magna Carta which required that amercements (the medieval equivalent of the modern criminal fine) be proportionate to the fault of the defendant. *Solem v. Helm*, 103 S.Ct. at 3006-3007 and n.9. *See also Weems v. United States*, 217 U.S. 349, 375-76 (1910); A. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Cal. L. Rev. 839, 845-46 (1969).

relatively small for an antitrust violation. In the instant case, the government established that petitioner had been involved in rigging no more than fourteen projects over a seven year period. The total value of the winning bids on these projects was $6,922,972.46 or $988,996.07 annually.[4]

These figures pale in significance when compared with the annual amount of commerce affected in the average criminal Sherman Act case. The average annual amount of commerce affected in antitrust cases between 1955 and 1980 in the Western District of Pennsylvania was $149,960,000, in the Third Circuit $186,240,000, and in the United States as a whole $160,770,000. 2 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980*, Table 20, at 706-707 (1981).[5] Thus, the amount of commerce affected here was less than one percent of the size (and thus one percent of the seriousness) of the average criminal Sherman Act case in the district, the circuit, or the nation.

In addition to the fact that this conspiracy was not a major restraint on the national economy, other facts traditionally

4 These figures do not represent the amount of profits illegally obtained by the conspiracy but rather are based on the amounts of the winning bids submitted on the 14 projects for which there was some evidence that petitioner had participated in bid rigging. Even taking the total of the bids made by petitioner on the 62 jobs listed in the government's amended bill of particulars, the total amount of commerce affected was $30,144,925 or $4,306,418 annually. The latter figures are overstated since they are based on petitioner's bids which were not always or even usually the winning bids and since there was absolutely no evidence that all of the jobs on the amended bill of particulars were rigged.

5 Although the comparison above is based on the average annual amount of commerce affected, a comparison based on the average total amount of commerce affected also indicates the disproportionality of petitioner's sentence. The total amount of commerce affected in this case was slightly less than $7 million. Expressed in 1981 dollars, the total amounts of commerce affected in the average case from 1955 to 1980 in the Western District of Pennsylvania was $1,492,720,000, in the Third Circuit $1,264,710,000, and in the nation $1,195,930,000. 2 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980*, Table 19, at 714-15 (1981). Again the crime involved here is less than one percent of the severity of the average antitrust crime.

relevant to sentencing for antitrust crimes indicate the relative lack of gravity of the offense. There was only one victim of the crime, the United States Steel Corporation. The impact of the crime was, thus, borne directly by a large sophisticated corporation and not by individual consumers. Moreover, the conspiracy was a local one, affecting United States Steel only in certain of its plants in the limited geographical area of western Pennsylvania. In addition, the bids which were the subject of the conspiracy comprised only a very small portion, approximately one to three percent, of the cost of the total construction projects involved.

The evidence indicates not only that the economic impact of the conspiracy was minimal but also suggests that the only victim of the crime invited the activity involved. In furtherance of their defense that United States Steel knew of and acquiesced in the conspiracy, defendants sought to establish at trial that the peculiar bidding procedures employed by United States Steel were conducive to bid rigging. At the conclusion of the sentencing hearing after it had imposed sentences on all defendants, the district court noted that it was not its usual policy to make public statements concerning matters before the court but felt it was necessary to condemn the bidding procedures of United States Steel:

> A strange and mysterious practice in this case, as far as the Court was concerned, was the practice of United States Steel in asking a known list of bidders for a written bid on a contracting job and then, after bids were submitted, calling each bidder and asking for a so-called firm and final bid. To me, this was simply an invitation to corruption.

The facts that the conspiracy affected a single victim, in only a limited geographic area, on bids that were only a very small portion of the construction project to which they related and that the conspiratorial conduct was, in the eyes of the sentencing judge, invited by the victim are surely mitigating, and not aggravating, factors. These factors further indicate that the

maximum sentence was a harsh penalty not warranted by the relative lack of gravity of the offense charged.

The second factor in the *Solem* analysis, the sentences imposed on others in the same jurisdiction, also indicates that the fine imposed here is excessively disproportionate. It is possible to compare the fine imposed on petitioner with other fines imposed on corporate defendants in criminal antitrust cases in the Western District of Pennsylvania.[6] The average fine

6 Although it is difficult for petitioner to compare its sentence with the sentences imposed on other criminals in the Western District of Pennsylvania, a comparison with the maximum statutory penalties for other federal crimes is possible. Although this comparison probably understates the disproportionality of petitioner's sentence under the second *Solem* factor, it nevertheless demonstrates that petitioner's sentence is grossly disproportionate. For example, the largest fines contained in the entire Criminal Code, Title 18 U.S.C., are $250,000 (18 U.S.C. § 831—prohibited transactions involving nuclear material; 18 U.S.C. §§ 1512, 1513—tampering with or retaliating against a witness, victim, or informant; 18 U.S.C. §§ 2318, 2319—trafficking in counterfeit record labels and criminal copyright infringement). Petitioner's sentence is quadruple these amounts. The only laws other than the Sherman Act providing for million dollar maximum fines are 15 U.S.C. § 78dd—2(b)(1)(A) and 15 U.S.C. § 78ff(c)(1)(A) (relating to foreign corrupt practices by domestic concerns) and 42 U.S.C. §§ 6928(d), (e) (relating to knowing endangerment by transportation of storage of hazardous wastes). Petitioner has no information with regard to the sentences imposed under these statutes.

Of the crimes listed in the Criminal Code, petitioner's crime is perhaps most comparable to the offense contained in 18 U.S.C. § 1860 which punishes agreements to refrain from bidding on public sales of United States land with a maximum fine of $1,000. This is a thousandth the size of petitioner's fine. Several crimes much more severe than petitioner's are punished with smaller sentences. Thus, if petitioner had installed new armaments on a Soviet warship (18 U.S.C. § 961—$1,000 fine) or recruited soldiers for serving in a war against the United States (18 U.S.C. § 2389—$1,000 fine) or had defrauded the Federal Deposit Insurance Corporation of millions of dollars (18 U.S.C. § 1007—$5,000 fine) or had installed defective materials at a defense facility with intent to obstruct the national defense (18 U.S.C. § 2156—$10,000 fine) or had threatened to blow up a major city with a nuclear weapon (18 U.S.C. § 831—$250,000 fine), petitioner would have received a lighter penalty. In short, petitioner received the harshest criminal sentence which can be imposed on an organization. Yet petitioner's conduct, although certainly not innocent, was not even close to being the most serious criminal conduct in which an organization could engage.

imposed on a corporate defendant in criminal antitrust cases in the Western District of Pennsylvania after the 1974 amendment to the Sherman Act raising the maximum fine level[7] was $148,598.59 in 1981 dollars (or $137,562.50 in dollars not adjusted for inflation). 2 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980*, Tables 17 and 18, at 698, 701 (1981). Petitioner thus received a fine which is over six times greater than the usual fine for a crime which was less than one one-hundredth of the severity of the average violation in the district.[8]

A review of the third factor confirms that the fine imposed on petitioner was grossly and unconstitutionally disproportionate. Under this factor, the sentence should be compared with sentences for the same crime in other jurisdictions. The average corporate fine for an antitrust violation in the United States as a whole after the 1974 amendment to the Sherman Act was $104,485.26 in 1981 dollars (or $89,461.70 in dollars not adjusted for inflation). 2 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980*, Tables 17 and 18, at 700, 703 (1981).[9] Considering that the average annual amount of commerce affected in criminal antitrust cases in the United States

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7 The maximum penalty for corporations for a violation of Section One of the Sherman Act was increased in 1974 from $50,000 to $1 million by the Antitrust Procedures and Penalties Act, Public Law 93-528, Sec. 3, 88 Stat. 1708 (1974).

8 This case is unlike those cases where a defendant has demonstrated that his sentence is greater than average but ignored that the severity of his crime is also greater than average. *See, e.g., United States v. Serhant*, 740 F.2d 548, 554-55 (7th Cir. 1984). Here, the sentence was substantially greater than average for a crime which was substantially less severe than average.

9 From a review of these statistics, the Third Circuit concluded that "defendants frequently are fined, and fined in large amounts." App. A at 11a. This simply misses the point. Undoubtedly defendants convicted of passing bad checks are frequently jailed and given substantial jail sentences but that did not establish the proportionality of the maximum sentence given the defendant in *Solem*. The question there, as here, is whether the defendant's particular sentence is proportionate to the defendant's particular conduct. 103 S.Ct. at 3016.

was $160.77 million in 1981 dollars, the sentence here was grossly disproportionate: the fine imposed is nearly ten times the average fine for a crime that was less than one one-hundredth of the severity of the average antitrust crime in the United States as a whole.

The extremely rare cases in which a million dollar fine has been imposed in criminal antitrust cases further illustrate the disproportionality of the sentence. Since the 1974 amendment to the Sherman Act which established the million dollar maximum fine, million dollar fines have been imposed in only 13 cases. In two of those cases the sentence was suspended (Blue Book Nos. 2814, 2905),[10] in one case the sentences were subsequently reduced (Blue Book No. 2681) and in eight of the cases (including one of the sentences in this case) million dollar fines were imposed pursuant to plea agreements whereby the defendants settled numerous actual or possible antitrust prosecutions by agreeing to plead guilty and to pay million dollar fines in a few cases. (Blue Book Nos. 2865, 2874, 2941, 2942, 2943, 3086, 3098, 3104).[11] Thus, in only two previous cases,

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10 Blue Book numbers refer to the Department of Justice Antitrust Division's internal numbers assigned to each case brought by the Division. The history of each case brought by the Antitrust Division is reported by Blue Book number in [1970-1979 U.S. Antitrust Case Summary Transfer Binder] Trade Reg. Rep. (CCH) ¶¶ 45,070-45,079 for Blue Book Nos. 2141-2731 and in 4 Trade Reg. Rep. (CCH) ¶¶ 45,080-45,084 for Blue Book numbers over 2731 and for updates on earlier Blue Book numbers.

11 In 1982, pursuant to a plea agreement, Ashland-Warren, Inc. pleaded guilty to six counts alleging bid rigging in violation of the Sherman Act in five cases and was fined $1 million on each count. In return the government agreed not to press any further criminal charges against Ashland-Warren or its parent company for any bid rigging scheme in paving or construction work prior to April 8, 1982. 42 Antitrust & Trade Reg. Rep. (BNA) 768 (April 15, 1982). Pursuant to three plea related agreements, the Howard P. Foley Company similarly pleaded guilty to one count indictments in three cases, including this one, alleging bid rigging and was sentenced to pay $1 million fines in each case. The third plea agreement, relating to this case, provided that Foley would not be prosecuted "for any act or offense committed before the date of this plea agreement . . . with respect to the submission of collusive bids for any electrical construction project."

have million dollar fines been imposed without being suspended, reduced, or without the fines being imposed pursuant to a plea agreement. In these two cases, *United States v. Atlantic Container Line*, Crim. No. 79-00271 (D.D.C.) (Blue Book No. 2705) and *United States v. Deerfield Specialty Papers, Inc.*, Crim. No. 80-00094 (E.D. Pa.) (Blue Book No. 2743), the annual amounts of international and national commerce affected were $200 million and $111 million respectively, or over 110 times the amount of local commerce involved here. 1 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980*, at 439, 442-43 (1981).

In light of the objective standards for proportionality review laid down in *Solem v. Helm*, the sentence imposed upon petitioner was an "excessive fine" within the meaning of the eighth amendment. Although the Third Circuit admitted that petitioner had demonstrated that its sentence was "extensive," App.A at 11a, the Third Circuit found the sentence not to be disproportionate because petitioner's corporate codefendants had been given the same fines and because Congress, not the judiciary, had established the maximum fine. Neither of these reasons for the Third Circuit's decision justify departing from the standards for proportionality review established by this Court. Because the sentence imposed on petitioner failed to meet the requirements for a proportionate sentence, the Third Circuit's judgment should be reviewed so that the sentence can be vacated[12] and the proportionality standards developed by this Court may be reestablished in the Third Circuit.

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12 Contrary to the Third Circuit's opinion, App.A at 2a, petitioner does not seek a modification of its sentence on appeal but only a determination that the sentence is unconstitutional and should be vacated so that a constitutional sentence may be imposed by the district court. Cases such as *Ex Parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833), therefore do not apply.

II. The Factors Relied On By The Third Circuit Eviscerate This Court's Test For Proportionality

A. That Codefendants in the Same Case Received the Same Sentence Does Not Establish Proportionality

That other codefendants in the same case received the same sentence for the same crime does not, either of itself or together with the fact that none of the sentences exceeded the statutory maximum fine, establish the proportionality of petitioner's sentence. If this were so, a district court could immunize its sentences in a multidefendant case from proportionality review merely by giving the defendants identical, but disproportionate, sentences.

The proportionality exception carved out by the Third Circuit is simply inconsistent with this Court's test for proportionality. This Court's proportionality standards recognize that, to some degree, it may be more important to deter a certain type of criminal conduct in one jurisdiction than it would be in another jurisdiction. Proportionality standards must provide some leeway for this concern: a theft of a small airplane which could be used for smuggling illicit drugs from South America to south Florida might justifiably be punished more severely in the Southern District of Florida than it would be punished in the District of Minnesota. Thus, one factor in this Court's proportionality standards looks to the sentences previously imposed in the sentencing jurisdiction. But other factors indicate that local concerns are not absolute: the sentencing court must also consider the harshness of the penalty in relation to the offense in the abstract and must consider how other jurisdictions have punished similar conduct. *Solem v. Helm*, 103 S.Ct. at 3010-11.

Under the Third Circuit's approach, the sole criterion for proportionality is more limited than even that one factor of this Court's proportionality test which looks to local concerns about criminal activity. Rather than evaluating how all judges in the jurisdiction have punished criminal conduct, the Third

Circuit's opinion suggests that it is only necessary to review how one judge punished the same criminal conduct in the same case.

The Third Circuit's logic is not only contrary to the rationale behind this Court's proportionality standards but is also internally inconsistent. That petitioner received the same sentence that its corporate codefendants received suggests that the district court's sentence was directed toward punishing the conspirational conduct of petitioner and its corporate codefendants and that the individual circumstances of each defendant were relatively a smaller concern in the exercise of the district court's sentencing discretion. Because the sentence was directed principally at punishing the conduct charged, it was more important to compare how the sentence imposed for the conduct in this case related to the sentences imposed for similar conduct in other cases than it was to compare how the various participants in this case were punished for identical conduct. Yet the Third Circuit's standard looks only to how one judge in one case in one jurisdiction sentenced multiple corporate defendants which had engaged in identical criminal conduct.

In sum, that identical sentences were imposed by the same judge punishing the identical conduct of multiple defendants is of little relevance to the constitutionality of those sentences under the eighth amendment. The standards for proportionality review are much broader: proportionality does not require that multiple defendants be given identical sentences for identical conduct, *see, e.g., United States v. Ely*, 719 F.2d 902, 905-906 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1313 (1984) (no disproportionality where defendant given longer sentence than his codefendants), but that, where a given type of conduct is to be punished severely, the punishment must be appropriate for the conduct and there must be some rough parity between sentences for that conduct throughout the United States. *See Solem v. Helm*, 103 S.Ct. 3001, 3010-11 (1983). The Third Circuit's approach does not remotely serve to implement this constitutional requirement.

B. That the Sentence Does Not Exceed the Statutory Limits Is Irrelevant to Proportionality Review

The Third Circuit's second justification for upholding the disproportionate sentence here was that it was within the range of penalties Congress provided for the violation proved at trial. This justification is wholly irrelevant to proportionality review. If proportionality review were only appropriate where a sentence exceeded the range of penalties provided by the legislature, it would be a redundant remedy. It is well established that a sentence set in excess of the statutory maximum is illegal and must be at least partially vacated, quite without any regard to the proportionality of the sentence. *United States v. Pridgeon*, 153 U.S. 48, 62 (1894); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 176-177 (1873). *Cf. Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972).[13] Given our system of constitutional adjudication, it would be unnecessary for any court to analyze for constitutional proportionality a sentence which exceeds the statutory maximum fine.

The irrelevance to proportionality review of the fact that a sentence is set within the range of penalties provided by legislature is further demonstrated by this Court's proportionality decisions. In *Solem v. Helm*, 103 S.Ct. 3001 (1983), this Court held a sentence to violate the eighth amendment despite the fact that it was set within the statutorily permissible range of penalties. Similarly, in *Enmund v. Florida*, 458 U.S. 782 (1982), the defendant was sentenced to death, a sentence within the statutory range of permissible penalties. This Court stated that the legislative judgment in enacting appropriate penalties was relevant but not controlling, 458 U.S. at 797, and held that the sentence violated the eighth amendment. *See also Coker v. Georgia*, 433 U.S. 584, 597 (1977); *Furman v.*

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13 Indeed, in *United States v. Francesco*, 725 F.2d 817 (1st Cir. 1984), the court indicated separate evaluations of a sentence for proportionality and for exceeding the maximum statutorily permitted penalty were appropriate. 725 F.2d at 823.

Georgia, 408 U.S. 238, 313-14 (1972) (White, J. concurring) (eighth amendment bars some punishments "whether legislatively approved or not").

A further illustration of the point is *Whitmore v. Maggio*, 742 F.2d 230 (5th Cir. 1984), where the Fifth Circuit relied on the decisions of this Court to reach a result at odds with the opinion of the Third Circuit in this case. In *Whitmore*, the Fifth Circuit reversed the decision of the sentencing court that its sentence was proportional solely because it did not exceed the maximum penalty provided by statute. 742 F.2d at 233-34. The Fifth Circuit vacated the sentence and remanded the case to the district court with instructions that it was to conduct a "*Solem* analysis." 742 F.2d at 234. *Accord* 1 T. Cooley, *Constitutional Limitations* 692-93 (W. Carrington 8th ed. 1927) (eighth amendment applies where "a punishment, though not beyond any limit fixed by statute, is nevertheless so clearly excessive as to be erroneous in law").

Proportionality review of a sentence does not depend solely on the range of penalties provided by the legislature. Although the penalties which the various legislatures establish for a type of criminal conduct is an important comparison for proportionality review, *see Solem v. Helm*, 103 S.Ct. 3001, 3009 (1983); *United States v. Ambrose*, 740 F.2d 505, 510 (7th Cir. 1984), and some deference must be given to the legislature to establish appropriate penalties, *Weems v. United States*, 217 U.S. 349, 378-79 (1910), it is not enough to establish the proportionality of a particular sentence that a single legislature has established a broad range of penalties for a broad range of conduct and that the sentence falls within this range. If this were enough, Mr. Helm would still be serving his life sentence and Mr. Enmund would long ago have been executed.

C. Imposition of the Maximum Sentence Here Is Contrary to Congress' Intent in Enacting the Statutory Range of Penalties

The Third Circuit's opinion is not only defective because its heavy reliance on legislative judgment regarding appropriate sentences deviates from this Court's proportionality standards but because the Third Circuit incorrectly assumed that when Congress enacted the statutory range of penalties for antitrust violations it intended that conspiracies of the type proved at trial were to be punished with the maximum fine. It is important to consider how the legislature intended the statutory punishments to be applied. *See United States v. Ambrose*, 740 F.2d 505, 510 (7th Cir. 1984) (interpreting the intended relationship between 18 U.S.C. § 2 and 21 U.S.C. § 848 for proportionality). Had it analyzed the intent of Congress in passing the Antitrust Procedures and Penalties Act which raised the maximum corporate fine for antitrust violations to one million dollars, the Third Circuit would have concluded that, even by its own proportionality standards, the fine imposed on petitioner was not appropriate.

The traditional reluctance of the courts to impose the maximum fine in criminal cases under the Sherman Act is consistent with the intent of Congress in enacting the Antitrust Procedures and Penalties Act, Public Law 93-528, Sec. 3, 88 Stat. 1708 (1974), to raise the maximum fine to one million dollars. The million dollar maximum fine was not designed for routine price-fixing cases and Congress relied heavily on the judgment of the district courts to impose the maximum fine only where it was appropriate:

> First, the penalty is a ceiling and not a floor. Second, discretion is provided to the . . . courts in imposing it. They will consider, as they do now, such factors as the means and circumstances of the defendant, the practice involved, the duration of the violation, the degree of culpability, and the effect on the economy.

Hearings on S-782 and S-1088 before Senate Committee on Antitrust and Monopoly, 93rd Cong., lst Sess. 5 (1973) (remarks of Sen. Tunney). Indeed, the then Assistant Attorney General in charge of the Antitrust Division, Thomas E. Kauper, testified regarding the bill to increase the maximum fine that "courts at present do not often impose even the [then current] maximum fine of $50,000. This judicial restraint is expected to continue." Hearings on S-782 and S-1088 before Senate Committee on Antitrust and Monopoly, 93rd Cong., lst Sess. 96 (1973).[14] *Cf. Report of the Attorney General's National Committee to Study the Antitrust Laws* 352 (1955) ("A maximum fine should be calculated for the worst conceivable case. The judge can exercise discretion within that range.").

The maximum penalty was raised to one million dollars in response to complaints about the inadequacies of the then-current maximum fine to punish large national conspiracies where billions or hundreds of millions of dollars of commerce were affected. Hearings on S-782 and S-1088 before Senate Committee on Antitrust and Monopoly, 93rd Cong., 1st Sess. 129-30 (testimony of Harold E. Kohn), 138 (testimony of Worth Rowley), 184 (testimony of Ralph Nader) (1973). *See also* H. Rep. No. 93-1463, 93rd Cong., lst Sess., *reprinted in* 4 U. S. Cong. & Adm. News 6535, at 6540 (1974). It was not designed to apply to the local conspiracy here which affected a single victim and involved less that $7 million in commerce.

In view of this legislative history, the Third Circuit's reasoning that imposition of the maximum fine on petitioner "was the expression of the Congress, not the judiciary," App.A at 11a, is without support. Congress did not expect the district

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14 Prior to the passage of the Antitrust Improvements and Penalties Act, the then existing maximum fine of $50,000 had been imposed in only 33 cases out of 401 antitrust cases in which sentences had been imposed on corporate defendants in this period. *See generally* 1 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980* (1981). The average corporate fine during the period was $15,532, or less than one third of the maximum fine. 2 J. Clabault & M. Block, *Sherman Act Indictments, 1955-1980* at 700 (1981).

courts to impose the maximum fine in every case but relied on proper exercise of their discretion to impose the maximum fine in appropriate cases where billions or hundreds of millions of dollars in commerce were affected by the antitrust violation. Imposition of the maximum fine on petitioner for its participation in a small, local conspiracy involving a single victim who invited the illegal conduct was inconsistent with Congress' intent in raising the maximum fine.

CONCLUSION

The eighth amendment's prohibition of "excessive fines" surely must have some meaning. Yet the Third Circuit's opinion, by using a standard of proportionality review which provides a constitutional remedy only where a remedy already exists, has nullified that constitutional prohibition. The district court imposed on petitioner a harsh penalty substantially out of proportion both to the nature of the crime and to the penalties imposed by courts both within the jurisdiction and in other jurisdictions. If the eighth amendment's prohibition of "excessive fines" is to have substance, the supremacy of this Court's standards for eighth amendment proportionality review must be reestablished and the Third Circuit's opinion upholding the unconstitutional sentence imposed on petitioner must be reversed.

For the reasons stated, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3242, 84-3243, 84-3244, 84-3253,
84-3266, 84-3267, and 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Fischbach and Moore, Incorporated,
Appellant in No. 84-3268

(D.C. Crim. No. 83-00098-01)

Appeal from the United States District Court for the
Western District of Pennsylvania—Pittsburgh

Argued October 3, 1984

Before: ALDISERT, *Chief Judge*,
HUNTER and WEIS, *Circuit Judges*.

(Filed December 10, 1984)

OPINION OF THE COURT

ALDISERT, *Chief Judge*.

Three principal issues are presented in this appeal from sentences imposed on a guilty verdict in a criminal anti-trust prosecution: whether the proof at trial varied from the indictment charging a single, continuing conspiracy; whether the government introduced sufficient evidence to prove the interstate commerce element of the Sherman Act violation; and whether this court should set aside or modify, on appeal, the one million dollar fine levied against defendant Fischbach & Moore. Appellants assert several less significant arguments, including the admission of an allegedly prejudicial government exhibit; prosecutorial misconduct during closing argument; errors in jury instructions; and the denial of a continuance to defendant Arbogast. Because we find no reversible error, we affirm the judgment of the district court.

I.

For approximately seven years, from 1974 to 1981, representatives of several electrical contracting companies met at the Duquesne Club in Pittsburgh. The purpose of these meetings was to allocate electrical construction projects, by bid rigging, at the Western Pennsylvania Works (Works) of United States Steel (USS). Whenever one of the companies desired to rig a bid, that company's representative would telephone the other contractors and arrange a meeting. After deciding among themselves which firm would receive the contract, that firm's representative would contact the other contractors and would tell them what bid to submit, ensuring that his firm's bid would be the lowest. Some of the firms kept track of the allocations to ensure that each contracting company received its fair share of work.

As a result of investigating this bid rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged

them with violating § 1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects. Although some of the defendants plea bargained to the charges and avoided trial, three electrical contracting companies, Fischbach and Moore (F&M), Sargent Electric, and Lord Electric, and four individual employees, Paul Arbogast, Joseph Rodgers, Frederic Sargent, and Ralph Vryenhoek, stood trial on the charges. They are the appellants before us.

Prior to trial, one of the defendants, Paul Arbogast, was indicted and prosecuted in Montana for an unrelated Sherman Act violation. The district court postponed the Western Pennsylvania trial once because of the Montana action. In mid-January 1984, Arbogast again moved for a continuance, the Montana trial not having ended and the Western Pennsylvania trial scheduled to begin in early February. The court denied this motion. Arbogast was acquitted in Montana on January 21 and began trial in Pittsburgh on February 6.

To narrow the scope of the trial, the government issued a bill of particulars, which it later amended, identifying contracts within the scope of the conspiracy. The proof at trial related to some, but not all, of the contracts on this list. The government also introduced extensive evidence to prove the interstate commerce jurisdictional element. This evidence included Government Exhibit 32 (Govt. Ex. 32), a file of invoices and freight bills for electrical materials and equipment bought by USS from out-of-state vendors for use in electrical construction projects at the WPW.

After a finding of guilty by the jury, the district court imposed both fines and prison sentences on the individual defendants. The three corporate defendants received fines of one million dollars each, the statutory maximum under § 1 of the Sherman Act. Defendants now appeal their convictions, and have asserted a long list of contentions, requiring this opinion to be more lengthy than what we believe to be appropriate in this court.

II.

Appellants raise three principal contentions. First, appellants F&M, Lord Electric, Sargent Electric, Paul Arbogast, and Joseph Rodgers allege a variance between the proof and the indictment. In a related argument, F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent allege that the government did not prove the interstate commerce element of the Sherman Act charge. In the third major contention, F&M alleges both that its sentence was illegal and that the trial court abused its discretion in imposing sentence.

The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980) (quoting *Burks v. United States*, 437 U.S. 1, 17 (1978)), *cert. denied*, 450 U.S. 967 (1981). Additionally, *Kotteakos v. United States*, 328 U.S. 750 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756.

In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir. 1983).[1] Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal. *United States v. Dickens*, 695 F.2d 765, 782 n.26 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1792 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fessler*, 453 F.2d 953, 954 (3d Cir. 1972). We now consider appellants' variance argument.

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1 *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, ____ (1984) (to be codified at 18 U.S.C. § 3742(a)) (effective Nov. 1, 1986) (will allow review of sentences under limited circumstances after Act's effective date).

III.

Appellants F&M, Sargent Electric and Paul Arbogast argue that because the government's evidence sought to establish multiple conspiracies and not the single, continuing conspiracy charged in the indictment, the convictions must fall as illegal. They allege variance in two respects: (1) that the government interpreted the indictment to charge that *all* electrical contracting bids were rigged during the time of the conspiracy, later reducing the number of bids in the bill of particulars and further reducing them at trial and (2) that the government proved not one continuing conspiracy, but a series of independent conspiracies, *i.e.*, that each contract the government proved the defendants rigged constituted a separate conspiracy.

A.

The indictment charged that the defendants conspired to "allocate among themselves electrical construction projects" at the Works; to "fix the prices at which electrical construction projects" were bid; and to "submit noncompetitive, collusive, complementary and rigged bids." App. at 21a-22a. But the indictment did not state that the conspiracy encompassed all bids or all contracts made during the seven-year period. Although the government so stated at a pre-trial conference, even if the appellants relied on these government representations or the bill of particulars as to the extent of proof, neither can modify the scope of the indictment. *United States v. Critchley*, 353 F.2d 358, 362 (3d Cir. 1965) (bill of particulars).

Even had the indictment read in terms of "all construction projects" and "all bids," the government still would have introduced sufficient evidence to prove the crimes charged. To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another, e.g. because the bid lists included companies with

which the defendants could not cooperate. Evidence of the fourteen rigged bids both proved that a conspiracy to rig bids existed and permitted the jury to conclude that the conspiracy encompassed all bids.

B.

We also conclude that the government introduced sufficient evidence to justify a jury finding of only a single conspiracy. The government proved that the defendants met, over a period of several years, at the Duquesne Club for the sole purpose of rigging bids and allocating contracts. The government introduced evidence to prove that all the participants knew the purpose of the club meetings and that they met as a group, thus negating the argument that separate groups of the defendants were conspiring together, with the same goal, but with their actions unconnected. More important, the government showed that some of the defendants kept records of which company received which job, ensuring that each firm would receive its fair allotment of the contracts. This recordkeeping indicated a single conspiracy that continued over time, and not separate conspiracies involving only certain contracts.

Because we hold that defendants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

C.

In a related argument, appellant Lord Electric maintains that the proof varied from the indictment in that the government proved one conspiracy, but that conspiracy had no effect on interstate commerce. As support for this contention, Lord Electric expressly declines to rely on *Kotteakos*, conceding that it suffered no prejudice from the variance alleged. Instead, Lord Electric relies on the language of the Sherman Act requiring the conspiracy to restrain "trade or commerce among the several States." 15 U.S.C. § 1.

As we understand this argument, Lord Electric contends that the government proved a single agreement to rig bids only at the time one of the defendants would telephone the others to arrange a meeting. This agreement, appellant states, was harm-

less and restrained no trade. Rather, the ensuing agreements reached at the meetings restrained trade, but those fourteen separate agreements were not charged in the indictment. We decline to adopt this convoluted construction of the offense charged in the indictment.

Lord Electric's argument starts to collapse when it concedes, as it does, that it conspired to fix bids when one of the other conspirators made a telephone call. Because we cannot isolate the original telephone call with the subsequent action triggered by the call, the keystone of this argument falls out. These telephone calls and the meetings that followed were an integral part of the conspiracy to fix bids, to which appellant agreed. To view the conspiracy in terms of artificial separate and distinct phases would give no meaning to the agreement into which Lord Electric entered and for which it was indicted. Had the defendants not contemplated making the telephone calls, no reason existed for them to agree to rig bids if the calls were made. Rather, the calls and Duquesne Club meetings constituted concerted activity to further the conspiracy to rig bids. As such, anticompetitive effects of these actions cannot be separated from the initial agreement to rig bids.

IV.

In a more particularized argument, defendant Rodgers contends that the government did not introduce evidence sufficient for the jury to find that he knowingly joined the continuing conspiracy charged in the indictment. He argues that he began to attend the Duquesne Club meetings only as a casual observer to protect the interest of his company Foley Electric and that his appearance was long after the other defendants entered into a conspiracy. To join a conspiracy, the government generally must prove two different types of intent: (1) the basic intent to agree, which is necessary to establish the existence of the conspiracy and (2) the more traditional intent to effectuate the the object of the conspiracy. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

In a situation very similar to that of Rodgers, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979),

defendants were convicted of a 26-year continuing conspiracy to fix the price of consumer bags. One defendant, Chase Bag, maintained that the government had introduced insufficient evidence to support its conviction, arguing that its behavior was legitimate price followership. *Id.* at 448. We affirmed Chase Bag's conviction, basing our decision on, among other things, Chase Bag's adoption of an unpublished price list of a competitor, St. Regis. We stated:

> Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by [Chase Bag's] apparent agreement with [St. Regis] to fix prices.

Id. at 455.

Although the issue is close, we are persuaded that the government introduced sufficient evidence to demonstrate that Rodgers knowingly entered the continuing conspiracy. Although he joined the Duquesne Club meetings at a point far into the conspiracy, his purpose in going there was to obtain contracts (specifically the contract designated as Govt. Ex. 23) for his company, Foley Electric. After it was agreed that Foley was to be the low bidder on this contract, Rodgers arranged the bid submissions on this contract by telephoning the other companies and telling them what prices to bid. The most damning evidence against Rodgers was his alleged reason for wanting this particular contract: "because he had cooperated with other people at the meeting and he felt that he should be given some consideration." App. at 1826a-27a. Viewed in the light most favorable to the government, this remark evidences Rodgers's knowledge both of the continuing nature and goals of the conspiracy and his intent to join the conspiracy and further its objectives. Rodgers's actions only confirm his understanding of and familiarity with the conspiracy.

If the testimony pertaining to Govt. Ex. 23 was the only evidence on which the government relied, perhaps Rodgers would have had a stronger case. See, e.g. the one-time only exception we suggested in *Continental Group*, 603 F.2d at 455. But here the government introduced evidence of Rodgers's involvement with another rigged contract, designated as Govt. Ex. 27. Although testimony was conflicting as to whether the contract was rigged over the phone or at a club meeting, viewed in the light most favorable to the government, the jury could have found that Rodgers also participated in rigging this contract. We therefore concluded that substantial evidence existed to tie Rodgers to the conspiracy.

We now turn to appellants' interstate commerce argument.

V.

Appellants F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent argue that the government did not prove the interstate commerce element of the Sherman Act charge.

Section 1 of the Sherman Act proscribes "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. The government may prove the connection of the restraint to interstate commerce under either of two independent theories. *McLain v. Real Estate Board of New Orleans Inc.*, 444 U.S. 232, 242 (1980). An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. *Id.* at 244. An "effect on commerce" theory, applies to primary intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *Id.* at 245-46; *see also Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

The government may prove the nexus between interstate commerce and the challenged activity through either the activities of the target of the antitrust violation or defendant's activities. *Id.* at 74. Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (price fixing); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) (bid rigging); *United States v. Flom*, 558 F.2d 1179, 1183 (5th cir. 1977) (bid rigging), the government is not required to prove any adverse impact on interstate commerce. *Northern Pacific*, 356 U.S. at 5.

Based on the trial testimony, we hold that the government introduced substantial evidence to support a jury finding that either the electrical contracting services were in commerce or that the defendants' activities affected interstate commerce. As to the in commerce theory, the government introduced evidence to show that the contractors and USS ordered substantial amounts of materials from out of state for use on the USS jobs. Not only pieces of equipment used in the Works jobs cost tens of thousands of dollars, but often showed that materials were shipped directly from out-of-state manufacturers to USS job sites. The electrical contracting services thus involved a substantial amount of interstate commerce. Because the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless, the contracting services were an essential, integral part of interstate commerce.

Moreover, the evidence also serves to prove the interstate element of the Sherman Act by satisfying the affecting commerce theory. Clearly, a large amount of materials used in the contracting jobs traveled through interstate commerce. *Per se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another.

We next consider F&M's argument pertaining to its sentence.

VI.

F&M alleges both that its sentence was illegal and that the judge abused his discretion in imposing sentence. The illegality argument is based on the theory that the one million dollar fine is disproportionate, thus violating the eighth amendment. F&M contends that the judge abused his discretion by basing the fine on the one million dollar penalty accepted by another defendant, the Foley Company, as part of its plea bargain.

F&M relies on *Solem v. Helm*, ____ U.S. ____, (51 U.S.L.W. 5019, June 28, 1983), in arguing that its fine is disproportionate. The Supreme Court suggested three factors for a court to consider in reviewing a sentence for disproportionality: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at ___, 51 U.S.L.W. at 5023. Evaluating these factors, we hold that the district court's sentence was not disproportionate and thus not illegal.

F&M brazenly committed a grave crime. The jury found the company guilty of conspiring to commit *per se* violations of the Sherman Act in a series of meetings that obviously were illegal. Moreover, F&M was one of the ringleaders of that conspiracy. As to the sentences imposed in the same jurisdiction, the penalties levied on the other defendants in this case provide a good example. Every individual defendant received a fine and a prison sentence; all the corporate defendants received one million dollar fines. Thus, in comparison, F&M's fine does not appear severe. Moreover, in comparing the sentence with those received by defendants in other jurisdictions, F&M provided extensive statistics on the infrequency of the imposition of the maximum fine. These statistics, however, illustrate that defendants frequently are fined, and fined in large amounts. Although F&M's one million dollar fine is extensive, its amount was the expression of the Congress, not the judiciary. Accordingly, we hold that the fine is not disproportionate to the gravity of the offense, the public policy

considerations implicated and the Congressional determinations.

F&M also contends that the district court abused its discretion by taking another defendant's punishment into account when fining F&M. F&M argues that because the judge gave no reasons for the fine imposed, it is reasonable to believe that he relied on improper motives. This court does not require a judge to elucidate his sentencing rationale.[2] *United States v. Del Piano*, 593 F.2d 539, 540 (3d cir.) (per curiam), *cert. denied*, 442 U.S. 944 (1979). Nor does F&M offer any evidence, other than the speculations of its excellent lawyers, of the judge's reliance on improper factors in the sentencing process. In short, "aside from characterizing [the fine] as excessive, defendant[ ] [has] presented no reason which would justify a conclusion that the sentence[ ] [was] anything other than the result of a proper exercise of judicial judgment." *Government of the Virgin Islands v. Rodriguez*, 423 F.2d 9, 11 (3d Cir. 1970). For the above reasons, we decline to set aside F&M's sentence.

VII.

We now consider defendants' remaining arguments in turn.

A.

Lord Electric contends that the district court should not have admitted Govt. Ex. 32, the file of purchase orders and invoices, because the exhibit was irrelevant. Additionally, it argues that even if Govt. Ex. 32 were relevant, the evidence was prejudicial and the trial judge should have excluded the exhibit pursuant to Rule 403, Federal Rules of Evidence. Because the initial relevancy decision implicates the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d

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2 But *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. ____, ____ (1984) (to be codified at 18 U.S.C. § 3553(c) (effective Nov. 1, 1986) (court will be required to "state in open court the reasons for its imposition of the particular sentence" after the Act's effective date).

238, 269 (3d Cir. 1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Cir. 1981). The Rule 403 decision, however, is reviewed under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 269-70.

For evidence to be admissible under Rule 402, it must be relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F.R. Evid. The Government sought to introduce exhibit 32 to prove the interstate commerce element of Sherman Act jurisdiction.

As noted earlier, and contrary to what defendant Lord asserts, the interstate commerce activities of the target of the antitrust violation, as well as the defendant, are relevant to a finding on the interstate commerce element. *Cardio-Medical Associates*, 721 F.2d at 74. Because this evidence tended to make the existence of the consequential fact of involvement with interstate commerce more probable than if the evidence were not available, Govt. Ex. 32 was relevant.

Yet even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, F.R. Evid. The defendant argues that Govt. Ex. 32 was more prejudicial than probative because the jury could not identify which invoices and freight bills related to the contracts at issue. The jury thus could have believed that evidence of every purchase of materials in interstate commerce contained in the file was relevant to proving the interstate commerce element of the crime.

Contrary to what Lord asserts, the jury could tie interstate purchases to particular contracts, by matching a project number to a job number. Although the process might be time consuming and the correlation not always perfect, this proce-

dure removed the prejudice about which defendant was concerned, and tilted the balance in favor of admissibility.

B.

Sargent Electric argues that it is entitled to a reversal because of allegedly improper remarks made by the prosecutor during his closing argument. In evaluating the prosecutor's comments, our standard of review is "whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights." *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

Sargent isolates three instances of misconduct to substantiate its contention. It states that the prosecutor expressed his subjective feelings as to its guilt, yet identifies no page in the transcript where this occurred. The government points to one remark of the prosecutor's: "I submit to you that the defendants are guilty . . . on the facts and the evidence . . . ." App. at 3673a. By tying his remarks to evidence on the record, *United States v. Schartner*, 426 F.2d 470, 477 (3d Cir. 1970), the prosecutor's remarks were not prejudicial.

Likewise, defendant's claims regarding other comments are baseless. The statement by the prosecutor that "[w]hat I would like to do is summarize what I think the issues in the case are . . . ," app. at 3610a, was merely a figure of speech, and not an injection of his personal feelings into the trial. The reference to Sargent Electric's financial reports, app. at 3651a, although the reports were not in evidence, was proper rebuttal to the defendant's assertion that it had made a complete financial disclosure to USS. *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

Sargent Electric makes one final related argument for reversal, arguing that the prosecutor's rebuttal was so lengthy—one and a half hours—and non-responsive as to amount to a second closing argument, permitting surrebuttal on the part of the defense. The judge had the discretion to limit the prosecutor's rebuttal and chose not to do so. In view of the compli-

cated nature of the case, the rebuttal was not overly long. Considering all the circumstances of the case, neither the rebuttal argument nor the prosecutor's remarks in any way violated defendant's due process rights.

C.

Defendant Arbogast argues that the trial court should have granted his second request for a continuance because his Montana trial ended shortly before the Pittsburgh trial began. In reviewing the trial court's decision, an appellate court will reverse the lower court only if the judge abused his discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980) (per curiam). The factors a court should consider when presented with a motion for a continuance include: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare his defense; and the rights of other defendants whose trials are delayed because of the continuance. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

In this instance, the trial court did not abuse its discretion. The judge's denial of the second continuance neither abridged Arbogast's right to due process nor was insupportable in light of the circumstances of the case.

Arbogast's reasons for seeking the continuance included giving him more time to prepare his defense and permitting him to be defended by counsel of his choice. Although this case is a fairly complex antitrust suit, Arbogast was aware of the general perimeters of the case against him when the district court first postponed the trial in October. Moreover, Arbogast discussed his defense for the Pittsburgh case with counsel during the Montana trial. Although Arbogast's first choice as counsel did not represent him in Pittsburgh, another lawyer from the same firm took over the representation. Despite these circumstances, Arbogast had approximately two weeks to devote to his Pittsburgh defense. Courts have found no constitutional violation in appointment of counsel cases when the defendant and his attorney have had much less time to prepare.

Ungar, 376 U.S. 575 (five days to answer show cause order); *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186 (3d Cir. 1969) (counsel appointed on day of trial).

Additionally, the judge already had continued the trial once, for a period of several months. To have postponed this complicated trial again would not only have contributed to calendar congestion, but, more important, would have made the other defendants involved continue to wait to have their day in court.

D.

Sargent Electric, Lord Electric, Frederic Sargent, and Ralph Vryenhoek argue that the judge erred in giving instructions: (1) by shifting the burden of proof to the defendants by an instruction that price-fixing is *per se* illegal; (2) by failing to charge the jury fully on sham bidding; (3) by his instruction removing the element of intent from the jury's consideration; and (4) by his instruction on the "affecting commerce" theory pertaining to the interstate commerce element of the Sherman Act.

In evaluating the district court's ruling on points for charge, the standard of review is abuse of discretion. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 199 (3d Cir. 1970). Once the court has given an instruction, we must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977); *see also United States v. Park*, 421 U.S. 658, 675 (1975). The trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury. *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029, 1036 (3d Cir. 1970) (Aldisert, J., dissenting). We now address defendants' contentions *seriatim*.

The Supreme Court repeatedly has held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act. *Northern Pacific Railway*, 356 U.S. at 5; *United States v. Socony-Vacuum Oil Co.*, 310 U.S.

150, 220-22 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-97 (1927). Consequently, an instruction to this effect would "fairly and adequately" submit the issue to the jury. Moreover, this argument that the instruction creates an irrebuttable presumption has been considered and rejected by several jurisdictions. *See, e.g., United States v. Koppers Co.*, 652 F.2d 290, 293-96 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972).

Sargent Electric argues that the court should have given a more complete instruction on sham bidding; it maintains that the instruction should have identified several aspects of USS's bidding procedures as potentially sham bidding and that the sham bidding instruction should have related to the rule of reason, rather than the *per se*, approach. The judge's instructions, however, adequately presented the issue to the jury.

The court initially referred to sham bidding in general terms. The court then instructed the jury that if USS acquiesced in the allocation of contracts, they should find the defendants not guilty. The court thus presented the essence of the sham bidding defense to the jury, although not in terms of specific practices. Moreover, Sargent Electric never requested the court to give the instruction in any particular language. Thus, the court's failure to adopt language other than that which it used is not reversible because the instruction did not represent "plain error resulting in a manifest denial of justice." *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980).

Additionally, no reason existed for the judge to couple the sham bidding instruction with a reasonableness instruction. Price-fixing and bid rigging are *per se* violations. Defendant's conduct, even if USS were a monopsonist as defendant contends, did not fall in any "gray zone" requiring a reasonableness instruction. *See United States v. Giller*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979). For the reasons stated above, the district court did not err in giving the challenged instruction.

Sargent Electric also alleges that the court's instructions removed consideration of the element of intent from the jury.

The court instructed that no showing of specific intent to disobey the law or restrain trade or knowledge of the illegality of the activities was necessary and defendants could be convicted if they knowingly formed the conspiracy or knowingly joined the conspiracy. App. at 3722a. Prior to this, the court also instructed that intent could be proved by showing that the acts of the defendants had the effect of bid rigging and the acts were undertaken with knowledge of the bid rigging; or defendants' acts did not have any proscribed effects, but the defendants undertook those acts with a conscious purpose of bringing about the proscribed effects. *Id.* at 3721a-22a.

The trial court's instructions avoided the problems of presuming intent simply from the commission of certain acts discussed in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the jury was asked to find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act. Moreover, not only did the instructions follow the language accepted by this court, especially as to specific intent, see *United States v. Continental Group, Inc.*, 603 F.2d 444, 462-63 (3d Cir. 1979), but part of the instructions followed the exact language of defendants' proposed instruction No. 14. App. at 3819a. Viewed as a whole, the instructions were a correct statement of the law and fairly and adequately presented this issue to the jury.

Appellants also object to the jury instructions pertaining to the "affecting commerce" theory because the judge stated that the jury need only find that the commerce involved was substantial and that they did not have to find a rise in prices or a shift in commerce and the judge instructed that the government could satisfy either the in commerce or affecting commerce theory to prove the interstate commerce element of the Sherman Act. The court's instructions, however, correctly stated the law. *Per se* violations require no proof of an anti-competitive effect on commerce. *Northern Pacific Railway*, 356 U.S. at 5. Also, evidence that supports either theory pertaining to the interstate commerce element is sufficient to

establish a Sherman Act violation. *McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

E.

Relying on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), defendant Rodgers alleges prejudice because the district court failed to marshal the evidence against him. A trial court, however, need not marshal the evidence, especially if the trial is complex. *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir. 1961). Unlike *Kelly*, where the evidence did not connect the defendant to the single conspiracy charged, Rodgers suffered no prejudice by a failure to marshal the evidence because that evidence directly connected him to the conspiracy.

VIII.

We have carefully considered all contentions presented by the appellants. The judgment of the district court will be affirmed in all respects.

Appendix B

Judgment of the District Court

United States of America

—v.—

Defendant: FISCHBACH AND MOORE, INC.

United States District Court
for Western District of
Pennsylvania
Docket No.
CRIMINAL NO. 83-98

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: 4-19-84 with counsel: Norman H. Seidler, Esq. & James Eizner, Esq.

Plea: Not Guilty (Ct. Rep T. Thomas)

Finding & Judgment

There being a verdict of: Guilty

Defendant has been convicted as charged of the offense(s) of:

COUNT 1: Combining and conspiring in unreasonable restraint of interstate trade and commerce (15 USC § 1)

Sentence

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant pay a fine to the United States in the sum of One Million ($1,000,000) dollars on or before May 21, 1984.

It is further ordered that the defendant is ordered to pay 1/7 of costs of prosecution on or before May 21, 1984.

Signed by:

U. S. District Judge /s/MAURICE B. COHILL, JR.

Date: 4/19/84

Appendix C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3268

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Fischbach and Moore, Incorporated,
Appellant in No. 84-3268

(D.C. Crim. No. 83-00098-01)

Appeal from the United States District Court
for the Western District of Pennsylvania—Pittsburgh

Present: ALDISERT, *Chief Judge*,
HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel October 3, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 19, 1983, in W.D. Pa. Crim. Nos. 83-98-08, 83-98-09 and 83-98-10, and entered April 20, 1983 in W.D. Pa. Crim. Nos. 83-98-04, 83-98-07, 83-98-03, and 83-98-01, appealed here respectively at Nos. 84-3253, 84-3243, 84-3244, 84-3242, 84-3266, 84-3267 and 84-3268 be, and the same are hereby affirmed. All the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

December 10, 1984